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Docket Nos. 96-84, 96-83

In the
Supreme Court of the United States
1995 October Term

ROY L. JENSEN, HOWARD S. SIMPSON,
Petitioners,

v.

STATE OF KANSAS,
Respondent.

ON PETITION FOR CERTIORARI TO THE KANSAS SUPREME COURT

JOINT BRIEF IN OPPOSITION TO PETITIONS FOR CERTIORARI BY RESPONDENT STATE OF KANSAS

Carla Stovall,
Attorney General of the
State of Kansas

John W. Campbell
Senior Deputy Attorney General
Kansas Judicial Center
Topeka, Kansas 66612-1597
(913) 296-2215
Counsel of Record for Respondent State of Kansas

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JOINT BRIEF IN OPPOSITION TO PETITIONS FOR CERTIORARI BY RESPONDENT STATE OF KANSAS

I. THE PETITIONERS' ARGUMENT

Petitioners make the following argument in their Petitions for Certiorari:

> Does a criminal prosecution after the assessment of a state drug tax and one hundred percent penalty for the possession of marijuana, imposed prior to and independently of the criminal proceeding, violate double jeopardy principles established in *Department of Revenue of the State of Montana v. Kurth Ranch*, 511 U.S. ___, 114 S. Ct. 1937 (1994)?

Petition at i.[1] Petitioners thereafter offer the following sub-issues on this sole point:

> A. The Kansas decision improperly interprets the holding in *Kurth* by creating an "unusual features" test instead of looking at the tax as a whole to determine whether it constitutes punishment for jeopardy purposes.
>
> B. State Appellate Courts are divided in their interpretation of *Kurth* creating directly conflicting decisions.

Petition at 4, 7. The State of Kansas respectfully submits that neither of these points has merit.

II. SUPPLEMENTAL STATEMENT OF FACTS

On a most significant point, the petitioners have failed to correctly advise the Court as to the facts of this case. The "Journal Entry Finding Defendant Guilty of Count Two" indicates that the petitioner *Jensen* was found guilty on the charge of *possession of marijuana with intent to sell* without paying the drug tax and that conviction is in issue in this case. Petitioner's Appendix at 60-61.[2] The charge of *possession with intent to sell marijuana within 1000 feet of a school* was dismissed by the district court based on Double Jeopardy but reinstated by the Kansas Supreme Court in the decision below, and that charge is in issue in this case. *State v. Jensen,*

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[1] The petitions of Jensen and Simpson are, for purposes of the State's response, identical. As such, except where otherwise specifically noted, all references herein are to the page numbers in petitioner Jensen's petition including his appendix.

[2] References hereinafter to the appendix will be indicated by "App." followed by the page number. All references are to petitioner Jensen's appendix except where otherwise specifically noted.

259 Kan. 781, 796-97, 915 P.2d 109 (1996) (App. at 1, 26-27, 38).

The "Memorandum of Decision" and "Journal Entry" entered in petitioner *Simpson's* case indicate that the State dismissed the charge of possession of marijuana without paying the drug tax. Simpson App. at 28, 44. The charge of *possession of marijuana with intent to sell* was dismissed by the district court based on Double Jeopardy but reinstated by the Kansas Supreme Court in the decision below, and that charge is in issue in this case. *Jensen*, 259 Kan. at 796-97 (Simpson App. at 1, 26-27, 28, 39).

Both petitioners were assessed drug tax pursuant to Kansas' drug tax law. K.S.A. 79-5201(c) thereof, App. at 62, requires that the person possess *more than 28 grams*.

The significance of these facts will be discussed in greater detail, § III C 1, below. Suffice it to say here, however, that in addition to the other reasons why Double Jeopardy does not apply in this case, neither petitioner has been twice punished for the "same offense."

III. ANALYSIS OF PETITIONERS' ARGUMENT:

A. PETITIONERS' CLAIM THAT: "THE KANSAS DECISION IMPROPERLY INTERPRETS THE HOLDING IN KURTH BY CREATING AN 'UNUSUAL FEATURES' TEST INSTEAD OF LOOKING AT THE TAX AS A WHOLE TO DETERMINE WHETHER IT CONSTITUTES PUNISHMENT FOR JEOPARDY PURPOSES"

The petitioners claim that the Kansas Supreme Court in its decision below incorrectly applied an "unusual features" test to gauge the constitutionality of Kansas' drug tax law against this Court's decision in *Kurth*. Petitioners claim that

the correct test is the tax "as a whole." The petitioners incorrectly read this Court's decision in *Kurth*, however, and inaccurately portray Kansas' drug tax law. The issue is clearly no more than an attempt on their part to obscure the real issues.

1. PETITIONERS INCORRECTLY READ KURTH

Any doubt concerning the appropriateness of analysis of a drug tax law's "unusual features" test vanishes with the words of Justice Stevens, author of the majority opinion in *Kurth*, in his dissent in part, concurrence in part, in *United States v. Ursery*, 116 S. Ct. 2135 (1996) (discussed in greater detail, § III C 2, below). Referring to *Kurth*, Justice Stevens stated:

> [In Kurth] we considered the nature of the tax, *focusing on several unusual features* that distinguished it from ordinary revenue-raising provisions . . . . *On that basis*, we held that imposition of the tax after criminal prosecution of the taxpayer violated double jeopardy [emphasis supplied].

Id. at 2157.

The majority opinion in *Ursery* also confirmed that the Court employed an "unusual features" analysis in *Kurth*:

> [In *Kurth*,] *[s]everal differences* between the marijuana tax imposed by Montana and the typical revenue-raising tax were readily apparent. . . . *From these differences*, we determined that the tax was motivated by a " 'penal and prohibitory intent rather than the gathering of revenue [emphasis supplied].' "

Id. at 2144.

The language of *Kurth* also supports this conclusion and petitioners have quoted the operative language in their Petitions:

> Taken as a whole, this drug tax is *a concoction of anomalies* too far removed *in crucial respects* from the standard tax assessment to escape characterization as punishment for the purpose of Double Jeopardy analysis [emphasis supplied].

Petition at 5. As such, petitioners' claims are clearly misplaced that a reviewing court is not required to compare the various features in a particular law with those features this Court determined objectionable in *Kurth*.

The Kansas Supreme Court previously conducted just such a comparison in holding Kansas' law distinguishable from Montana's in *Kurth*. *State v. Gulledge*, 257 Kan. 915, 922-30, 896 P.2d 378 (1995)(App. at 78-103).[3] In fact, the Court held Kansas' law "significantly different [from] the Montana Tax Act." *Id.* at 930 (App. at 102). The Kansas Supreme Court, in the decision below, relied on *Gulledge* to reiterate its holding that, given its particular features, Kansas' law is not punishment for Double Jeopardy purposes. *State v. Jensen*, 259 Kan. 781, 791-97, 915 P.2d 109 (1996) (App. at 17-27). The Kansas Supreme Court clearly applied the correct standard of review as dictated by this Court in *Kurth*, and petitioners' claims to the contrary have absolutely no merit.

2. PETITIONERS INACCURATELY PORTRAY KANSAS' DRUG TAX

a. PETITIONERS' CLAIM THAT ALL KANSAS DRUG TAXPAYERS ARE IN VIOLATION OF LAW

Petitioners also make several misstatements in their Petitions concerning the nature of Kansas' drug tax, found in

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[3] Gulledge filed a motion for leave to proceed *in forma pauperis* in this Court but did not file a petition for writ of certiorari.

K.S.A. 79-5201 *et seq.*(App. at 62-69). Petitioners claim that "the entire class of taxpayers subject to this tax are persons in possession of marijuana illegally." Petition at 4. This statement is misleading. As construed by the Kansas Supreme Court in *Gulledge*, above, 257 Kan. at 924 (App. at 91, Kansas' tax "does not apply to everyone who illegally possesses drugs. It only applies to those possessing illegal drugs in larger quantities in response to the legislative concern that this flourishing underground economy not operate on a tax-free basis." *Accord Covelli v. Commissioner of Revenue Services*, 668 A.2d 699, 705 n.20 (Conn. 1995), *vacated and remanded, Covelli v. Commissioner*, 116 S. Ct. 2577 (1996). If the Kansas legislature had intended to make the drug tax law strictly a crime-fighting device, it clearly would have covered *all* conduct made criminal by Kansas' Uniform Controlled Substances Act, K.S.A. 65-4101 *et seq.*, not just *some*.

Similarly, other Kansas taxes are imposed only on those making a business or other gain out of the venture. For example, Kansas' retailer's sales tax, K.S.A. 79-3601 *et seq.*, is not imposed on most "isolated or occasional sales." K.S.A. 79-3606(l). Further, Kansas' income tax, K.S.A. 79-3201 *et seq.*, is imposed only on those with incomes exceeding certain benchmarks. *E.g.*, K.S.A. 79-3220(a).

Regardless of the reach of Kansas' drug tax, this Court in its most recent explanation of the reach of the Double Jeopardy clause, noted that "though both statutes [criminal and forfeiture] are tied to criminal activity, as was the case in [a precedent case], this fact is insufficient to render the statutes punitive. . . . By itself, the fact that a forfeiture statute has some connection to a criminal violation is far from the clearest proof necessary to show that a proceeding is criminal." *Ursery*, above, 116 S. Ct. at 2149 (*Ursery* is discussed in greater detail, § III C 2, below).

b. PETITIONERS' CLAIM THAT KANSAS' TAX RATE IS HIGH

The petitioners also argue that Kansas' drug tax rate is allegedly eight (8) times Montana's tax rate in *Kurth*. As support, the petitioners allege that Kansas' tax is imposed every three (3) months, Petition at 4, 7, and that a 100% penalty is imposed when the taxpayer fails to pay the tax, *id.* at 4, 7. Petitioners assert that "it was anticipated that no one would pay the tax when due . . . ." *Id.* at 7.

Apart from the absence of any factual support in their Petitions for the last claim,[4] the other statements are again not accurate. As construed by the Kansas Supreme Court in *Gulledge*, above, the reason why Kansas' tax stamps are valid for three (3) months (rather than indefinitely) is that "Presumably, the short life span of the tax stamps reflects the legislature's recognition of the rapid turnover rate of illicit drugs." 257 Kan. at 923 (App. at 91). The charges against petitioners involving the intent to sell illustrate the point. Certainly, there is no claim in this case that the petitioners, or anyone else for that matter, have been required to pay the drug tax more than once. In any event, other Kansas taxes, property taxes, for example, are imposed on a periodic basis (yearly). K.S.A. 79-5106 (motor vehicles); 79-2004a (other personal property); 79-2004 (real property).

As concerns the petitioners' claim that the 100% penalty imposed for the failure to timely pay the tax is additional evidence of an allegedly high tax rate, the correct construc-

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[4] In *Gulledge*, the Kansas Supreme Court noted that "The brief of *amicus curiae* Kansas Department of Revenue (KDR) states that over one-half million dollars in drug tax was collected in both fiscal year 1993 and fiscal year 1994." 257 at 919 (App. at 84). Clearly, someone has been paying the tax, whether voluntarily or involuntarily.

tion of Kansas' law is that by the Kansas Supreme Court in this case:

> The express language of [K.S.A.] 79-5208 supports the understanding that what is being penalized is the failure to pay the tax. . . . Since the 100 percent penalty is exacted for failing to pay the drug tax rather than possessing the drug, Jensen and Simpson were not punished more than once for failing to pay the drug tax. . . . The 100 percent penalty is punishment for the offense of failing to pay the drug tax, and the punishment for the dismissed charges would have been for possessing the drug.

Jensen, above, 259 Kan. at 796 (App. at 25-26). Significantly, the 100% drug tax penalty is consistent with numerous other tax penalties found in Kansas law, as amicus Kansas Department of Revenue argued below[5]; petitioners have never addressed this fact.

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[5] *E.g.*, K.S.A. 40-246a, 40-246c (200% penalty ["double the amount of the tax"] for failure to pay insurance law tax); K.S.A. 41-407(a)(1) (200% penalty ["double the amount of the tax"] for evading liquor tax); K.S.A. 79-1434(b) (200% penalty ["twice the amount of tax"] for failure to pay transient dealer tax); K.S.A. 79-1427a (50% penalty for failure to report taxable personal property); K.S.A. 79-3228(d) (100% penalty for failure to pay, or timely pay, income tax); K.S.A. 79-3322(a) (100% penalty for failure to pay cigarette tax license or permit fee, or cigarette tax); K.S.A. 12-1,105 (50% penalty for failure to file return of gross earnings); K.S.A. 12-1694b(d), 12-1698a(d) (50% penalty for failure to timely pay or report transient guest tax); K.S.A. 79-332a(a)(2) (50% penalty for failure to timely file return of assessment of oil and gas); K.S.A. 79-3615(d) (50% penalty for fraudulent failure to file or pay, *etc.*, sales tax); K.S.A. 79-4225(a) (50% penalty for fraudulent failure to file or pay severance tax); K.S.A. 79-4705(c) (25% penalty for fraudulent failure to pay bingo tax). K.S.A. 79-3464e(d), amending Kansas' motor fuel tax law, provides for penalties that could be astronomically higher than the tax *per se*.

Thomas v. C.I.R., 62 F.3d 97 (4th Cir. 1995), provides further guidance. There, plaintiff claimed the Double Jeopardy clause barred imposition of a 50% fraud penalty for failure to report income after his conviction on drug charges. The Court rejected the claim, explaining:

> Assessment of an addition to tax does not necessarily follow from a defendant's conviction for § 846 conspiracy. It is possible for a person to participate in the illegal sale of drugs, yet pay taxes based on the income generated by those sales. In that instance, punishment for the drug offense would be proper, but there would be no basis for holding the defendant accountable for tax deficiencies or additions to tax. Conversely, a person could participate in wholly legal activities, yet be delinquent in his payment of income taxes. While there would be no basis for a criminal prosecution relating to the income-generating activity, the government would be entitled to payment of a tax deficiency and, depending on the amount of the deficiency, possibly to an addition to tax for civil fraud. Like the tax court, we find that Thomas' violations of the criminal and civil law stemmed from wholly distinct conduct. [Citation omitted.]

Id. at 99-100. *Accord Hyatt v. State Department of Revenue*, 597 So. 2d. 716, 718-19 (Alab. 1992) (drug tax).

As such, the petitioners' claim that Kansas' tax rate is effectively doubled by imposition of the tax penalty is inaccurate. If a taxpayer complies with the law, he or she will not be faced with the prospect of paying any penalty.

c. PETITIONERS' CLAIM THAT KANSAS' TAX IS IMPOSED ONLY AFTER ARREST

The petitioners also claim that Kansas' tax in reality is imposed only after the person's arrest. Petition at 6,7. This

statement is, once again, misleading. On its face, Kansas' tax is due and payable "immediately upon possession or acquisition" in Kansas. K.S.A. 79-5204(d)(App. at 65). The Kansas Supreme Court explained that:

> The Kansas tax is levied on the possession of drugs regardless of whether the taxpayer has been arrested for criminal conduct. The tax is due immediately upon acquisition or possession of marijuana in the state; criminal prosecution is not required. . . . The Kansas tax is . . . intended to be assessed when the taxpayer is in possession of the property.

Gulledge, above, 257 Kan. at 924-25 (App. at 92, 93). The federal income tax system is to the same effect, effectively a "self-assessment" system.

The fact that persons may chose to evade the drug, or other, tax should not transform the event triggering the tax, here, the act of possession or acquisition. As the *Covelli* court explained:

> We acknowledge that in many, if not most, cases, Connecticut's tax will not be imposed until the taxpayer has been arrested and until the illegal drugs have been confiscated or destroyed. The practicalities surrounding the imposition of the tax, however, merely reflect the reality of attempting to tax an illegal activity. [Citation omitted.] The taxpayer's voluntary choice to ignore his or her tax obligations should not be the determinative factor in evaluating whether Connecticut's tax constitutes punishment in the double jeopardy context. . . . It would be anomalous indeed if persons conducting an illegal business were excused from the payment of a tax on that business because the failure to pay the tax was not discovered, as a result of their own dereliction, until after

> they had been arrested and double jeopardy protection attached. [Citation omitted.]

Covelli, above, 668 A.2d at 706.

The petitioners' claim that Kansas' drug tax is in reality only imposed after arrest is subject to their proof, the party attacking the constitutionality of a Kansas law bearing the burden of proof on the issue, *State v. Durrant*, 244 Kan. 522, Syl. ¶ 1, 769 P.2d 1174, *cert. denied*, 492 U.S. 923 (1989). There is no such proof in this record.

d. ADDITIONAL FEATURES OF KANSAS' LAW NOT NOTED BY PETITIONERS

Additional features of Kansas' drug tax law not specifically noted by petitioners in their Petitions should be examined:

i. PROOF OF HIGH TAX RATE

As concerns the high rate of tax feature, there is simply no evidence in this case that the drug tax assessment against petitioners was greater or less than the market (or other benchmark) value of the quantity of marijuana that the petitioners possessed. In fact, the Kansas Supreme Court noted just such a defect in proof in the defendant's constitutional challenge in *Gulledge*:

> Additionally, as *amicus curiae* points out, there is no evidence in this case regarding the relationship of the assessment to the market value of the marijuana or any other benchmark. The market value can vary depending on a number of factors, such as quality, supply and demand and volume sold. . . . In the present case there is simply no evidence on this point.[6]

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[6] In *Kurth*, testimony was presented concerning the market value of the drugs in issue. 511 U.S. ___, 114 S. Ct. at 1943, 1946 n.17.

Gulledge, above, 257 Kan. at 923 (App. at 90-91).

While Kansas' drug tax rate for marijuana, K.S.A. 79-5202(a)(1) (App. at 63), is in part identical to Montana's,[7] the question how that tax rate fares against market (or other benchmark) value is a *fact-driven* question; the State of Kansas should not be bound by the *evidence* in *Kurth*. *Cf. Richards v. Jefferson County*, 135 L. Ed. 2d 76 (1996) (by analogy; due process bars application of collateral estoppel to person neither a party to prior action nor in privity with party).

ii. DETERRENT PURPOSE

Nor is deterrent purpose dispositive of the issue. The State does not dispute that Kansas' drug tax is intended in part to deter person's engaging in such conduct, and the Kansas Supreme Court has so noted. *Gulledge*, 257 Kan. at 923 (App. at 90); *Durrant*, above, 244 Kan. at 531. Without more, this is an unremarkable proposition for an excise tax, however, as the existence of excise taxes on alcoholic beverages and tobacco products proves.

Significantly, this Court seems to have agreed in its most recent explanation of the reach of the Double Jeopardy clause: "although both statutes [criminal and forfeiture] may fairly be said to serve the purpose of deterrence, we long have held that this purpose may serve civil as well as criminal goals." *Ursery*, above, 116 S. Ct. at 2149. As such, deterrent purpose is not damning in Double Jeopardy litigation.

In any event, the Kansas Court of Appeals noted of legislative deliberations on the drug tax:

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[7] Kansas' law is also materially different because it does not contain a variable provision, as did Montana's, that the tax would be the *greater* of two benchmark rates, there, *the greater* of $100 per ounce or 10% of market value. 511 U.S. ___, 114 S. Ct. at 1946 n.17.

> Although the minutes of the Kansas House and Senate Committees show that the primary purpose of the act was to combat drug usage, raising revenue was a motive that was definitely considered. The committee minutes reflect the following statement by Rep. Robert Miller: "The taxes would provide a way to tax part of the flourishing underground economy that is normally operating on a tax-free basis."

State v. Matson, 14 Kan. App. 2d 632, 640, 798 P.2d 488 (1990). In addition to this judicial recognition that Kansas' law was also designed to raise revenue, Kansas' drug tax in fact serves that purpose. Note 4, *supra*.

iii. TAX CHARACTERISTICS

The 1994 Kansas legislature further recognized the fundamentally *tax* nature of the law by incorporating similar collection procedures from the Kansas income tax act, K.S.A. 79-3235, and from chapter 60 generally. K.S.A. 79-5212 (not contained in petitioner's appendix). Although "jeopardy" collection features remain in the drug tax law, K.S.A. 79-5205(a) (App. at 65), such features are by no means common and also exist in Kansas' income tax act, K.S.A. 79-3229, and sales tax act, K.S.A. 79-3610. The Kansas Department of Revenue also recognizes the fundamentally *tax* nature of the law through its administration of the law. Hearings pursuant to the drug tax law are held before the Director of Taxation just as are all other tax hearings at that level, and may be appealed in the same fashion. *E.g.*, K.S.A. 79-5205(b) (App. at 66); 74-2438. Further, if the person is unable to pay the tax, a payment plan might be worked out. App. at 41 (tax warrant).

iv. REPORTING REQUIREMENT

In addition, in Montana, law enforcement officers making drug arrests were *required* to report to the Montana Rev-

enue Department. 511 U.S. ___, 114 S. Ct. at 1941. Although cooperation may exist between the Kansas Department of Revenue and law enforcement, Kansas has no such reporting requirement. *Gulledge*, above, 247 Kan. at 925 (App. at 93). Rather, the Director of Taxation assesses tax based on personal knowledge or information. K.S.A. 79-5205(a)(App. at 65); *Gulledge*, above, 257 Kan. at 925 (App. at 93).

v. INCRIMINATION

The *Kurth* Court also noted that in Montana, taxpayers were required to file a drug tax return within seventy-two hours of their arrest, 511 U.S. ___, 114 S. Ct. at 1941, and nowhere referred to any self-incrimination protection under Montana's law. Kansas' law, however, protects against the taxpayer's compelled incrimination:

> All information obtained through compliance with K.S.A. 79-5201 *et seq.* is confidential and may not be used as evidence in the prosecution for any crimes other than enforcement of the act itself. Any evidence obtained through the use of such confidential information is likewise confidential and inadmissible in the prosecution of any criminal offense, other than for the enforcement of the act itself.

Durrant, above, Syl. ¶ 12. *See also* K.S.A. 79-5206 (App. at 66); *Gulledge*, above, 257 Kan. at 925 (App. at 92-93). Nor, as noted above, is the taxpayer's obligation to pay the tax tied to any criminal arrest or prosecution. As such, Kansas drug taxpayers are simply not required to make the difficult choices that the pendency of a criminal prosecution may entail. *E.g. South Dakota v. Neville*, 459 U.S. 553, 564 (1983).

B. PETITIONERS' CLAIM THAT: "STATE APPELLATE COURTS ARE DIVIDED"

Central, perhaps, to the success of their Petitions is petitioners' claim that State appellate courts are divided on the question of the proper interpretation of *Kurth*. *E.g.*, Sup. Ct. R. 10(b). Petitioners rely on decisions from Illinois, Indiana, Nevada, and Texas each State holding its particular drug tax law unconstitutional. *Wilson v. Department of Revenue*, 662 N.E.2d 415 (Ill. 1996); *Bryant v. State*, 660 N.E.2d 290 (Ind. 1995); *Desimone v. State*, 111 Nev. 1221, 904 P.2d 1 (1995), *vacated and remanded, Nevada v. Desimone*, 116 S. Ct. 2576 (1996); *Ward v. State*, 915 S.W.2d 941 (Tex. App. 1996); *Stennett v. State*, 905 S.W.2d 612 (Tex. App. 1995). The law in each decision is, however, distinguishable from Kansas'. As such, there is no conflict as respects the constitutionality of Kansas' law.

The Illinois law in issue in *Wilson*, above, relied on in petitioners' Petitions at 6 n.1; 9, is readily distinguishable from Kansas'. There, the highest Illinois Court construed Illinois' law to require as a triggering event for drug tax liability not only the fact of possession of a controlled substance by the taxpayer, *but also the taxpayer's arrest, charging, and conviction of a criminal offense*. 662 N.E.2d at 420. As noted above, Kansas' law is not so dependent. The effect of that construction of Illinois' law also led the Illinois Court to note that the taxpayer was *unavoidably* liable for the penalty for failure to pay the tax plus interest, and no longer possessed the goods on which the tax was imposed, the latter a factor relied on by this Court in *Kurth*. *Id.* Kansas law, as explained, above is to the contrary.

The Indiana decision in *Bryant*, above, also relied on in their Petitions at 6 n.1; 9, is also readily distinguishable.

There, the Court first noted that the limited validity of a receipt for payment of taxes (forty-eight [48] hours) was consistent with a deterrent purpose. 660 N.E.2d at 296. As noted, Kansas has no such provision. Further, the Indiana tax rate was "$40.00 per gram, or $1,133.96 per ounce. This is a rate of over ninety times the market value and more than eleven times the rate imposed in *Kurth*." *Id.* Kansas' rate, as noted, is no higher than was Montana's. Although the Court also referred to other provisions in Indiana law which petitioners may claim are similar to those in Kansas law, *i.e.* tax commissioned on commission of criminal act and tax not imposed until after the person's arrest, *id.* at 296-97, the similarity is facial only and will not withstand close scrutiny, as the State has explained above concerning these features. The decision is not, in any event, final; the State of Indiana's petition for certiorari, filed March 26, 1996, remains pending before this Court in case No. 95-1567.

The original Texas decision in *Stennett*, above, was vacated by this Court on the defendant's petition for certiorari and remanded by this Court for further consideration in light of *Kurth*. 905 S.W.2d at 613. On remand, although the Texas Court of Appeals ultimately held Texas' law constituted punishment, it did not do so until determining that the law also contained several extra "unusual features" which even Montana's did not have: the tax collector cannot settle a tax case absent written request from the prosecutor; tax proceedings are postponed at the request of the prosecutor pending determination of the criminal case; the tax collector's right to collect the tax is subordinate to the State's right of forfeiture; and sale/possession of simulated substances is subject to the tax. *Id.* at 614. Petitioners have not noted these facts in their

Petitions. Kansas' law, however, has none of these extra "unusual features" in its law.[8]

Petitioners also fail to note that the neither *Stennett* nor *Ward* can be considered the final word from Texas. Although *Ward* was not further appealed, *Stennett* was appealed from the Court of Appeals to Texas' criminal court of last resort, the Court of Criminal Appeals. The undersigned understands that case has been argued and remains under advisement.

The Nevada law in issue in *Desimone*, above, is also distinguishable from Kansas'. Most significantly, Nevada's marijuana tax rate of $100 per gram, 904 P.2d at 4, far outstrips Kansas' tax rate. Further, Nevada law not only required that the taxpayer pay the tax but also "register[] with the Department." *Id.* at 2. Kansas' law has no such registration requirement. Further, the Nevada Court found clear legislative intent that the law was designed "to punish." *Id.* at 5. The constitutionality of Kansas' law has been repeatedly examined, *e.g.*, *Gulledge, Jensen*, above (and cases cited therein), but no such sinister motive uncovered. In any event, as petitioners note, Petition at 11, the decision in *Desimone* was vacated by this Court for further consideration in light of this Court's recent forfeiture decision in *Usery*, above (also discussed § III C 2, below).

Also not noted by petitioners is the decision by the North Carolina Court of Appeals in *State v. Ballenger*, 472 S.E.2d 572 (N.C. 1996). There, the Court conducted an "unusual features" analysis to hold that imposition of the tax did not

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[8] Inexplicably, the petitioners claim that the Texas decisions in *Stennett* and *Ward* did not contain an "unusual features" analysis. Petition at 8-10. These statements are clearly wrong as both Courts clearly used just such analysis. *Stennett*, 905 S.W.2d at 613-15; *Ward*, 915 S.W.2d at 946.

constitute punishment. *Id.* at 574-75. North Carolina's law is very similar to Kansas'. *See also Milner v. State*, 658 So. 2d 500 (Alab. App. 1994), *cert. denied* (1995)(post-*Kurth*; drug tax held constitutional); *State v. Stubblefield*, 249 Neb. 436, 543 N.W. 2d 743 (1996)(same); *McMullin v. S.C. Dept. of Rev. & Taxation*, 469 S.E.2d 600 (S.C. 1996)(same).

As such, although there may indeed be a "conflict" among State decisions whether *their* various drug tax laws pass constitutional muster in the eyes of the various state courts, the State respectfully submits that Kansas' law is distinguishable from those laws held unconstitutional. As such, there is simply no conflict as respects the constitutionality of Kansas' law.

C. ADDITIONAL MATTERS RELEVANT TO THIS COURT'S DETERMINATION OF THE PETITIONS

1. PETITIONERS HAVE NOT BEEN PUNISHED FOR THE "SAME OFFENSE" THEREFORE DOUBLE JEOPARDY IS NOT IMPLICATED IN THIS CASE

As noted § II, above, the charges/convictions in issue in this case have the common element of the *intent to sell*. Also as there noted, Kansas' drug tax law requires possession of more than twenty-eight (28) grams of marijuana. K.S.A. 79-5201(c) (App. at 62).

Under Kansas law, the determination whether a person criminally possessed marijuana with the intent to sell is not entirely dependent on quantity but may be proven by "equipment found with it, place it was found, manner of packaging, and opinion of experts that the narcotic was packaged for sale." *State v. Heiskell*, 21 Kan. App. 2d 105, 112, 896 P.2d 1106 (1995).

The Double Jeopardy clause prohibits three (3) things: "a second prosecution for the same offense after acquittal, a second prosecution for the same offense after conviction, and multiple punishments for the same offense." *Kurth*, 511 U.S. ___, 114 S. Ct. 1937, 1941 n.1. An appropriate inquiry in this case is whether the petitioners have been subjected to multiple punishments for the same offense. If the petitioners were "punished" for *different* offenses, the Double Jeopardy clause is not implicated. For the reasons stated below, the Clause is not implicated in these cases because the criminal offenses with which the petitioners have been charged/convicted are simply not the "same offense" as the "offense" of drug tax liability.

Answering the question what constitutes the "same offense" within the meaning of Double Jeopardy parlance ini-

tially requires a determination whether "each provision requires proof of a fact which the other does not." *Blockburger v. United States*, 284 U.S. 299, 304 (1932). *See also United States v. Dixon*, 509 U.S. ___, 113 S. Ct. 2849 (1993). This requirement has been incorporated into Kansas law. K.S.A. 21-3107(d)(2). *See, e.g., Jarrell v. State*, 212 Kan. 171, 175, 510 P.2d 127 (1973). What constitutes the "same offense" is determined by State law. *State v. Baker*, 255 Kan. 680, 683, 877 P.2d 946 (1994)(citing *Brown v. Ohio*, 432 U.S. 161, 167 [1994]).

As noted above, the district court record indicates that the criminal charges of which the petitioners were charged/convicted required the *intent to sell* marijuana.[9] Their drug tax liability, however, required the possession of *more than 28 grams of marijuana*. As such, "each provision requires proof of a fact which the other does not." *Blockburger*, above.[10] *Accord State v. Stubblefield*, 249 Neb. 436, 543 N.W.2d 743, 747 (1996). The petitioners did not address this critical fact in their Petition.[11]

Alternatively, *State v. Berberich*, 248 Kan. 854, 811 P.2d 1192 (1991), supports this result even without the element of

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[9] The charge in Count II against petitioner Jensen was possession of marijuana *with the intent to sell* without payment of the drug tax. App. at 60. The criminal offense is found in K.S.A. 79-5208. App. at 68. The latter does not *per se* require as an element the intent to sell although it does not plainly exclude such element. As Jensen made no objection on this basis to the charge, however, any objection has been waived. *E.g.*, K.S.A. 22-3208(3).

[10] The criminal charge against the petitioner *Simpson* of failure to pay the drug tax is no longer in issue in this case because the State dismissed the charge. Simpson App. at 28, 44.

[11] The issue was belatedly raised by the State of Montana in *Kurth*, but this Court did not resolve the issue for that reason. 511 U.S. ___, 114 S. Ct. at 1942 n.9.

intent to sell. There, the defendant contended *inter alia* that he could not be convicted of both possession of methamphetamine and failure to pay the drug tax on the possession of such drug. The Kansas Supreme Court examined K.S.A. 21-3107(d)(2) providing that a defendant cannot be convicted of both a crime and an included crime, the latter defined as "[a] crime necessarily proved if the crime charged were proved." 248 Kan. at 857. The Court rejected the argument, holding that, "A violation of K.S.A. 79-5208 for possession of a controlled substance without affixing the appropriate stamps showing payment of the tax is a separate and distinct offense from possession of marijuana or a controlled substance and one is not an included offense of the other." 248 Kan. at 862.

2. THIS COURT'S DECISION IN URSERY V. UNITED STATES DICTATES DENIAL OF THE PETITION FOR CERTIORARI

On June 24, 1996, this Court decided in *United States v. Ursery,* 116 S. Ct. 2135, that the forfeiture of property used in the commission of a criminal offense for which the owner of such property was also charged criminally, was not punishment for Double Jeopardy purposes. Although the Court there distinguished *Kurth,* 116 S. Ct. at 2144, 2147, this Court subsequently vacated drug tax decisions in Utah and Connecticut for further consideration in light of *Ursery,* as petitioners note, Petition at 11.

In *Ursery,* this Court determined the following two-part test dispositive of the Double Jeopardy issue:

> 1. First, Congress intended forfeiture to be a civil proceeding as most clearly demonstrated by the procedural mechanisms used to enforce forfeiture;

2. Second, other evidence did not disclose punitive form or effect despite Congress' non-punitive intent:

a. the forfeiture was punitive but also served important non-punitive goals;

b. forfeiture has not historically been regarded as punishment;

c. although an innocent owner's property is not subject to forfeiture, the government need not establish intent;

d. the deterrence served by forfeiture also served non-criminal goals; and

e. the fact that the forfeiture is tied to criminal activity without more is insufficient.

Id. at 2147-49. For the same reasons relied on by this Court to determine forfeiture is not a Double Jeopardy punishment, Kansas' drug tax likewise should not be considered punishment.

Initially, it is clear that the Kansas legislature intended the drug tax to be civil in nature; the procedural mechanisms used to enforce the tax are those adopted to enforce other tax liabilities, *i.e.* those under chapter 79 (taxation) and chapter 60 (civil procedure) of the Kansas statutes. § III A 2 d iii, above.

Further, no other convincing evidence discloses a punitive form or effect despite this non-punitive intent: first, although petitioners may claim the tax punitive, it also clearly serves non-punitive goals, for example, deterrence of socially-destructive behavior, raising of revenue for legitimate State purposes, taxation of an underground economy which has largely escaped sharing the burdens imposed on other tax-

payers, and ensuring that persons do not benefit from illegal activity. Second, taxes, like forfeitures, have long been considered legitimate, not punitive. *E.g., United States v. Sanchez,* 340 U.S. 42 (1950). Third, the deterrence created by the tax also serves non-criminal goals as noted above. Fourth, although the tax is tied to criminal activity, there is a legitimate non-criminal law reason for such fact: the activity taxed is one which has largely escaped taxation so far precisely because of its illegality. Finally, there is no scienter requirement beyond that the person must be illegally in possession. As noted, however, that requirement is a wholly unavoidable result of the nature of the activity sought to be taxed, illegal drug possession, sales, manufacture, *etc.*

3. AN ASSET SEIZURE ALONE IS NOT PUNISHMENT THEREFORE DOUBLE JEOPARDY IS NOT IMPLICATED IN THIS CASE

The State of Kansas concedes that one of the purposes of the *criminal* prosecutions of petitioners was punishment. In order to have "double jeopardy," however, it is necessary to have a *prior* jeopardy. Under Kansas law, the party claiming the invalidity or unconstitutionality of State law bears the burden of proof on the issue. *Durrant,* above, 244 Kan. Syl. ¶ 1. As such, petitioners bore the burden of proof in proceedings below to prove that they have been twice "punished" within the meaning of Double Jeopardy. Petitioners failed, however, to prove any in this case because an asset seizure alone is not punishment for Double Jeopardy purposes.

People v. Krizek, 271 Ill. App. 3d 533, 207 Ill. Dec. 857, 648 N.E.2d 313 (1995), is instructive. There, defendant moved to dismiss his drug indictment on Double Jeopardy grounds on the basis that his home was seized although no

final forfeiture order was entered. The Illinois Court of Appeals affirmed the denial of the motion, holding:

> Consequently, although the seizure of real property under the Forfeiture Act marks the beginning of the civil forfeiture process, the actual seizure itself has limited legal significance. The act of seizure neither extinguishes the ownership rights of claimants to the property, nor does it vest title in the State. The respective ownership rights of the parties remain unaltered until such time as the trial court enters its final judgment. Until final judgment is entered, the claimant has the opportunity to retain his ownership rights in the property. Common sense dictates that it is the deprivation of ownership, not the deprivation of the unencumbered use of the property, that determines when punishment for double jeopardy purposes occurs. The State's seizure of defendant's property, therefore, does not constitute punishment for double jeopardy purposes [citations omitted].

648 N.E.2d at 316. *See also United States v. Torres*, 28 F.3d 1463 (7th Cir.), *cert denied*, 115 S. Ct. 669 (1994)(prior forfeiture proceeding in which defendant made no claim to money did not bar subsequent criminal proceeding involving same conduct; "[y]ou can't have double jeopardy without a former jeopardy").[12]

In the State district court, the petitioners claimed, and the district court determined, that an asset seizure had occurred. Jensen App. at 28-29; Simpson App. at 29. Nothing

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[12] *Gulledge*, above, is distinguishable on this point because there, the Kansas Supreme Court noted that the parties stipulated that, "the seizure of the [defendant's] $428.00 is final and, otherwise, non-appealable." 257 Kan. at 916. (App. at 80).

more was alleged or proved, however, and there is no evidence in this case regarding the dispositions of such seizures. Seizure alone is not punishment for Double Jeopardy purposes.[13]

IV. CONCLUSION

Respondent State of Kansas respectfully requests that the Court deny the Petitions for Certiorari of both Jensen and Simpson.

Respectfully submitted,

Carla Stovall
Attorney General of the
State of Kansas

John W. Campbell
Senior Deputy Attorney General
Kansas Judicial Center
Topeka, Kansas 66612-1597
(913) 296-2215
Counsel of Record for Respondent State of Kansas

[13] The majority opinion in *Bryant*, above, 660 N.E.2d 290, determined a similar question but confused the distinct Double Jeopardy concepts of multiple *punishments* with multiple *prosecutions*.